SEKEMAS SDN. BHD.

v.

LIAN SENG CO. SDN. BHD.

SUPREME COURT, KUALA LUMPUR
LEE HUN HOE CJ (BORNEO)
HARUN HASHIM SCJ
MOHD. YUSOFF MOHAMED SCJ
[CIVIL APPEAL NO. 502 OF 1987]
10 MARCH 1989

CIVIL PROCEDURE: *Specific Performance - Discretionary remedy - Whether specific performance available where there is an alternative remedy of damages and rescission - Whether hardship on the defendant's part amounts to a defence to a claim for specific performance on the facts of the case.*

By an agreement dated 28 September 1983 the respondent/plaintiff agreed to sell to the defendant a piece of land in an area known as the Golden Triangle of Kuala Lumpur for RM15,110,700. The purchase price was to be paid by way of instalments the last of which was to be made on 27 September 1984. It was a term of the agreement that the defendant was to be given vacant possession after payment of the purchase price in full. However vacant possession was delivered to the defendant in June 1984 before full payment of the purchase price had been made. The defendant then demolished the buildings on the land to prepare the land for development.

The defendant failed to pay the plaintiff the balance sum of RM4,500,000 and the defendant's solicitors wrote to the plaintiff and asked for the refund of the monies paid subject to the deduction of 25% of the purchase price as agreed liquidated damages in accordance with Clause 9.01 of the agreement.

The plaintiff's solicitors wrote to the defendant's solicitors and requested the defendant to complete the agreement and stating that the plaintiff had the right to specific performance of the agreement in accordance with Clause 8.01 of the agreement.

The plaintiff sued the defendant and claimed *inter alia* for specific performance. The plaintiff applied under O. 81 of the Rules of the High Court 1980 for specific performance. At first instance the learned Judge ordered specific performance in favour of the plaintiff. The defendant appealed.

Held:

[1] The plaintiff had the option of either getting specific performance or to get liquidated damages. On the facts of the case damages was not an adequate remedy.

[2] The defence of hardship was not available to the defendant as the hardship was brought onto the defendants by their own acts in not ensuring adequate finance before embarking on this project.

[Appeal dismissed with costs.]

Cases referred to:

R.M. Venkatachalam Chettiar & Ors. v. N.K.R. Arunasalam Chettiar [1953] 19 MLJ 234
Haji Osman bin Abu Bakar v. Saiyed Noor b. Saiyed Mohamed [1952] MLJ 37
Patel & Anor. v. Ali & Anor. [1984] 1 All ER 978

Johnson & Anor. v. Agnew [1979] 1 All ER 883
Nicholas v. Ingram [1958] NZLR 972
Zaibun Sa binti Syed Ahmad v. Loh Koon Moy & Anor. [1982] CLJ (Rep) 58

Legislation referred to:
Specific Relief Act 1950, ss. 11(1)(c), (2), 20(1)(a), 21(2)(b)
Rules of the High Court 1980, O. 81

Other sources referred to:
Sale Purchase of Real Property by Professor Visu Sinnadurai, p. 436
Specific Performance by Gareth Jones & William Goodhart QC, p. 20

For the appellant - R.R. Chelliah, (K. Balaguru with him); M/s. A.K. Lee & Co.
For the respondent - P. Royan; M/s shook Lin & Bok

JUDGMENT

Lee Hun Hoe CJ (Borneo):

This is an appeal against the decision of the learned Judge confirming the order he made earlier in chambers.

By an agreement dated 28 September 1983 the plaintiff/respondent agreed to sell and the defendant/appellant agreed to buy a small piece of land of about three quarters of an acre situated in an area known as the Golden Triangle of Kuala Lumpur for RM15,110,700. The land was held under Selangor certificate of Title No. 8571 lot no. 73 s. 57, Town and District of Kuala Lumpur together with a building erected thereon and known as no. 34, Jalan Sultan Ismail, Kuala Lumpur. The purchase price was to be paid by instalments of which the last payment was to be made on 27 September 1984.

The defendant was to be given vacant possession after payment of the purchase price in full. However, in order to facilitate development of the property, the plaintiff, at the request of the defendant, delivered the property to the defendant in June 1984 despite the fact that payment in full had not been made. The defendant had since demolished all the buildings on the land in order to prepare the land for development.

On 27 September 1984 the defendant failed to pay the last instalment and was given time to pay. Subsequently, the balance was reduced to RM4,500,000.

By a letter dated 17 June 1986 the defendant's solicitors wrote to the plaintiff indicating that the defendant was unable to pay the balance of RM4,500,000. They pointed out that:

> In accordance with Clause 9.01 of the agreement upon default of payment by our client all sums paid by our client under the agreement shall have to be refunded subject to deduction of agreed liquidated damages not exceeding 25% of the purchase price.

In reply the plaintiff's solicitors wrote on 23 June 1986 to the defendant's solicitors requesting the defendant to complete the purchase. They made clear in paras. 3 and 4 that:

> 3. We wish to draw your attention to Clause 8.01 (not Clause 9.01 as stated in your letter) of the said agreement dated 28 September 1983 which specifically provides for the remedy of specific performance in the event of default by your clients as purchasers to pay any part of the purchase price.
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> 4. Furthermore, our clients have at the request of your clients already delivered vacant possession of the said property to your clients and your clients have demolished all the buildings on the said property.

The plaintiff sued the defendant on 11 July 1986 and claimed, *inter alia*, specific performance. By para. 6 of the defence it is contended that Clause 8 provides that in the event of default of payment the plaintiff can either claim for specific performance or liquidated damages agreed at 25% of the purchase price. In the event of forfeiture of the liquidated damages the plaintiff would refund the defendant the balance of the payment. The defendant claimed for refund of RM6,833,025. In defence to the counterclaim the plaintiff pointed out that he was entitled to the alternative remedy of specific performance. Therefore, the question of refund does not arise.

By summons in chambers dated 4 August 1986 the plaintiff applied pursuant to O. 81 of the Rules of the High Court 1980 for specific performance. The learned Judge made the order on 15 April 1987. At the request of the defendant the learned Judge heard further argument. On 26 October 1987 he confirmed the decision he made earlier in ordering specific performance of the contract. Hence the present appeal.

In the *Sale and Purchase of Real Property* Professor Visu Sinnadurai observes that specific performance is a discretionary remedy and over the years the Courts have spelt out the circumstances under which the relief may not be granted. These equitable principles are reflected in ss. 20 and 21 of the Specific Relief Act. Section 20(1)(a) provides that a contract will not be specifically enforced if the non-performance of it can be adequately relieved by compensation in money. As Professor Sinnadurai correctly pointed out at p. 436 this provision has to be read with some reservation in dealing with contracts for the sale and purchase of property. Section 11(2) clearly says that there is a presumption that in contracts for the sale of immovable property monetary compensation cannot be an adequate remedy. It was further shown that s. 20(1)(a) is of general application while s. 11(2) deals specifically with contracts for the sale of land. It is therefore right that s. 11(2) will prevail in cases involving contracts dealing with sale and purchase of property. He concluded his observation thus:

> ... The effect of these two sections is that it is for the defendant to establish that the plaintiff would be adequately relieved by an award for damages and that specific performance should not be granted. This burden of proof on the defendant is a heavy one and if he fails to satisfy the Court of the adequacy of damages, the Court will generally grant the relief to the plaintiff unless there are other special grounds against granting it.

Under s. 21(2)(b) the Courts may refuse to grant the relief of specific performance to plaintiff if the granting of it would involve some hardship on the defendant which he did not foresee. Each case must be decided on its particular facts. In *R.M. Venkatachalam Chettiar & Ors. v. N.K.R. Arunasalam Chettiar* [1953] 19 MLJ 234 Thomson J as he then was, held that no great hardship would be caused to the vendor's representative to complete the transaction even if it would incur some unanticipated expenditure. In *Haji Osman bin Abu Bakar v. Saiyed Noor b. Saiyed Mohamed* [1952] MLJ 37 specific performance was granted. The Court rejected the argument that hardship would be caused to the beneficiaries if such an order was granted. The appellant in *Patel & Anor v. Ali & Anor*. [1984] 1 All ER 978 was successful in her appeal against an order of specific performance on ground of hardship. There was in that case a period of more than four year's delay it would be just to leave plaintiffs to their remedy in damages. In *Johnson & Anor. v. Agnew* [1979] 1 All ER 883 the House of Lords varied the order of the Court of Appeal holding that if a vendor obtained an order for specific performance and it become impossible to enforce it, he then had the right to ask the Court to discharge the order and terminate the contract. On such an application he could be awarded damages at common law for breach of contract since the contract was not rescinded *ab initio* but remained in existence until it was terminated by the Court.

Finally, the New Zealand case of *Nicholas v. Ingram* [1958] NZLR 972 where the defence was based solely on financial inability to complete. We refer to the headnotes. In an action for specific performance of a contract for the sale of land, hardship on the part of the defendant may operate as a defence. But the hardship must, in general, be such as existed at the time of the contract and not such as has arisen subsequently from a change of circumstances.

The plaintiff does not agree with the defendant's interpretation of Clause 8. The vendor has a choice either to get specific performance or to get liquidated damages. Even before the full purchase price was paid the vendor gave possession of land to the purchaser who acted as if the land was his by demolishing all the buildings on the land in preparation for development.

In *Specific Performance* by Gareth Jones and William Goodhart QC under the heading 'Specific Performance Will Be Denied If Damages Are An Adequate Remedy' at p. 20 it is stated that:

> The mere fact that a contract contains a liquidated damages clause, or a clause of a similar nature, is not generally an admission that the parties have agreed that damages are an adequate remedy or that one party has an option to pay or perform, specific performance will nonetheless be granted if it is the appropriate remedy ...

This point was made clear by the Privy Council in the case of *Zaibun Sa binti Syed Ahmad v. Loh Koon Moy & Anor*. [1982] CLJ (Rep) 58. There the respondents sought specific performance of contract for the sale of land against the appellant. The learned Judge decided in favour of respondents but found that there was an oral agreement enabling the respondents to pay damages for breach. He therefore gave damages in favour of respondents who appealed to the Federal Court seeking specific performance of the contract. The Federal Court held the respondents were entitled to specific performance. In dismissing the appeal the Privy Council held, *inter alia*, that the fact that there was an alternative claim for damages in an action by the purchaser for specific performance of a contract for the sale of land could not be a fact relevant to the exercise of the discretion by the learned Judge and the Federal Court was entitled to exercise its discretion and was correct in reversing the decision of the Judge and ordering specific performance. As Lord Russell of Killowen in delivering the judgment of the Board at p. 94 questioned the refusal of the learned Judge to grant specific performance just because the learned Judge thought a sum was fixed in consideration of the purchase. He observed:

> ... If he thought that the fixing of the sum of RM5,000 deprived him of jurisdiction to order specific performance he appears to have ignored s. 19 of the Specific Relief Act, the terms of which are as follows:
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> > A contract, otherwise proper to be specifically enforced, may be so enforced, though a sum be named in it as the amount to be paid in case of its breach, and the party in default is willing to pay the same.

The defendant submitted that the law was covered by the Specific Relief Act 1950. Section 11(1)(c) makes clear that specific performance may be enforced at the discretion of the Court. It is to be granted only when pecuniary compensation is not an adequate remedy. In the instant case it is clear from Clause 8 of the agreement that the parties themselves were of the view that if there was a breach, pecuniary compensation would be adequate by payment of 25% of the purchase price. Section 11(2) does not apply to this case as it is not concerned with a breach to transfer property but a breach to pay money. Section 20 shows contracts which cannot be specifically enforced. Section 21(2) deals with question of hardship. The

purchaser was unable to raise money. One cannot compel an impecunious person to pay over RM4 million. The purchaser can be liable for damages which can be assessed later but should not be dealt with in a summary way.

The vendor has still got the land which he can sell to others. He may not be able to get the same purchase price when he sells the land. However, he may get damages from the purchaser for his loss in damages.

In theory, specific performance may be ordered against either party. In practice it is rarely done because of the difficulty of performance. The learned Judge did not ask himself whether compensation in money was adequate or not. If adequate then he should not grant specific performance. Also, he did not consider whether the purchaser was in a position to pay.

The same points were raised in the lower Court. The defendant stated that the defence rested on two grounds, namely, adequate remedy and hardship. On hardship the case of *Patel & Anor. v. Ali & Anor.* (*supra*) was referred to. See also *Johnson & Anor. v. Agnew* (*supra*) *and Nicholas Ingram (supra)* Basically, the defence is saying that financial hardship has resulted in their not being able to complete the purchase.

The learned Judge found difficulty in reconciling some of the case law on the subject. He was much influenced by the New Zealand case of *Nicholas v. Ingram* [1958] (*supra*) which held that a purchaser's inability to raise the purchase money is not a ground for refusing specific performance. He was aware that the appellant could not raise the money to meet the balance of the purchase price. The fact that the appellant had to borrow money to pay a large part of the purchase price is not a factor to influence his decision.

When the matter came before the learned Judge for further argument it was pointed out by the defendant that "the principles which apply to an application under O. 81 r. 1 are the same as those which govern application under O. 14." After hearing further arguments from both parties he has no reason to change his view. In fact, he confirmed the decision he made earlier in chambers. The appellant had been given possession of the land and he had demolished the buildings thereon even before he had paid the purchase price in full.

We agree with the learned Judge when he said that the hardship had been brought by the appellant himself when he decided to embark on this expensive venture without having secured adequate finance. We see no reason to interfere with the exercise of the discretion by the learned Judge. He has exercised his discretion judicially and properly.

For reasons given we would dismiss the appeal with costs. Deposit to respondent on account of taxed costs.

Also found at [1989] 2 CLJ 142